No. 458730-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as co-Personal Representatives of the Estate of Gerald Lee Munce, Deceased,

Plaintiffs,

v.

DENNIS CLINE and "JANE DOE" CLINE, individually and the marital community comprised thereof,

Defendants.

APPELLANTS' AMENDED OPENING BRIEF

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I. INTRODUCTION

This case arises out of a June 21, 2008 shooting of Gerald Munce by his father, Clarence Munce.[1] It is undisputed that during the police investigation that followed the shooting, Clarence confessed to the police that as a result of some kind of a dispute over a "bulldog" hood ornament Clarence first beat Gerald with a golf club, causing rib fractures and a lacerated liver, and then shot a grievously injured Gerald as he was running away. The location of the shooting was the driveway of Clarence Munce's home. The firearm Clarence used to shoot Gerald was an M1 carbine rifle, which he regularly kept behind his front door. Clarence told the police that when he shot Gerald he merely intended to scare him.[2]

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[1] A separate lawsuit was brought by the Estate of Gerald Munce, by and through its co-personal representatives Kristy Rickey and Kelly Cavar, against Clarence Munce. That separate lawsuit was brought under Pierce County Cause No. 08-2-10227-6. The final judgment in that case is currently before this Court in Appeal No. 45255-3. Prior to entry of final judgment in that case, issues were brought before the Court of Appeals, Division II by way of Motions for Discretionary Review; two of which were denied, and one of which was accepted. The two Motions for Discretionary Review, which were denied were brought by Clarence Munce, (through his litigation guardian ad litem Michael B. Smith), under Court of Appeals Cause Nos. 39531-2-II and 40377-3-II. An accepted Motion for Discretionary Review was brought by the Plaintiffs in this action, who are the same Plaintiffs in this matter. That accepted Motion for Discretionary Review resulted in an unpublished opinion located at 174 Wn.App. 1019, 2013 WL 1164068 (3/19/13). Herein, where necessary, this other of the case brought directly against Clarence Munce will be referenced as "the related case."

[2] Forensic evidence suggested that Clarence actually fired the M1 carbine rifle from a hip position. The forensic evidence also indicated that Gerald, (who had fractured ribs and a lacerated liver), was running down the driveway in a stooped position. This was evidenced by the fact that the shot from the elevated porch traveled through Gerald's back into his neck exiting out of his jaw. It was undisputed that the actual cause of death would have the asphyxiation caused by the destruction of Gerald's neck. (Ex. 42A).

This case relates to Clarence's possession of the M1 carbine rifle. It is undisputed that Clarence, who was well into his 80's at the time of the shooting, had had a long-term diagnosis of Alzheimer's/dementia and that at the time of the shooting he was on Alzheimer-related medications. Even prior to such diagnosis, Clarence had a severe alcohol problem and was recognized by family members as being a generally disagreeable personality, who at least on two prior occasions had pulled guns on other people.

The factual predicate for Appellants', (hereafter Plaintiffs'), liability theory against respondent Dennis Cline related to events that occurred a little over a year prior. The most critical events with respect to liability occurred on or about June 4, 2007. In the days prior to that date, Clarence had been in the hospital for a short stay. While his father was in the hospital, Gerald, Clarence's son, gathered Clarence's firearm collection, which included the M1 carbine rifle used to kill Gerald, and took possession of them for "safekeeping." Gerald had multiple justifications for taking the firearms, including the fact that Clarence's home was often left unlocked, and was located near a school. (RP Vol. VII, P. 72). Also, there were substantial concerns about Clarence's continuing ability to safety possess firearms given his Alzheimer/dementia diagnosis and medically documented shakiness. (Id. P. 74).

Upon returning home from the hospital, Clarence contacted the Pierce County Sheriff's Office alleging that Gerald had stolen his guns. Deputy Sheriff Vickie Kimbriel, (now "Morrison"), was dispatched to Clarence's home. Seeing a sheriff's vehicle at Clarence's home, Gerald's cousin and Clarence's nephew, Defendant Dennis Cline, stopped to see what was transpiring. (RP Vol. VII, P. 76-87).

Deputy Kimbriel very quickly determined that the matter was a "civil matter," and that Gerald had merely taken the guns for safekeeping out of concern for his father's well-being and public safety. (RP Vol. IV, P.12)(Ex.37). During the course of communications between Deputy Kimbriel, Mr. Cline and Gerald, (telephonically), it was determined that Clarence's, (and Gerald's, concerns could be resolved by an agreement by Clarence that he would not take back possession of the firearms, and that they would be placed in the care of Defendant Cline who, as opposed to returning them to Clarence, would take the firearms to a firearms dealer for the purposes of sale. (RP Vol. IV, P. 125-142). Believing that this family matter had been resolved, Deputy Kimbriel engaged in no further follow-up action.

Unfortunately, Mr. Cline, who at time of trial acknowledged his promises, within weeks returned the firearm collection to Clarence. (RP

Vol. II, P. 82-93). Again it is emphasized that one of those firearms was used to cause the death of Plaintiffs' Decedent, Gerald Munce.

This lawsuit was filed on March 16, 2010. The Complaint, within its body, (although not specifically titled as such), alleged two theories of negligence: 1) negligent entrustment of firearms to an incompetent/dangerous individual; and 2) negligent performance of a gratuitous undertaking.[3] CP.

As will be explored below, despite the fact that this case had been pursued through trial on the two above-referenced theories of negligence, the trial court, *sua sponte,* effectively dismissed Plaintiffs' gratuitous undertaking claim despite the fact that such a claim was supported by "substantial evidence," presented at time of trial. The method in which such a dismissal occurred was unusual in that it was not in response to any motion brought by the defense, but was a by-product of the trial court's *sua sponte* determination not to instruct the jury on this theory of the case, which occurred during the course of the parties' instruction conference and the taking of exceptions related thereto.

[3] To the extent that Plaintiffs' Complaint was unclear as to the causes of action being brought clarity was provided by Plaintiffs' response to Defendant's Motion for Summary Judgment, which clearly outlined both negligent entrustment and "negligent performance of a gratuitous undertaking" theory of liability. Defendant's Motion for Summary Judgment was denied in its entirety.

As a result of the trial court's *sua sponte* actions, all that was presented to the jury was a claim of "negligent entrustment," which by its very nature has a higher and more difficult standard of proof. A "negligent entrustment" claim by its very nature requires a showing that Clarence was "incompetent" to possess a dangerous instrumentality such as a firearm because he was known to be "reckless, heedless, or incompetent." See, *Cameron v. Downs*, 32 Wn.App. 875, 650 P.2d 260 (1982; *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982) (negligent entrustment of firearms).

Moreover, the events of June 21, 2008, which resulted in Gerald's death, were essentially unwitnessed. Gerald passed away and Clarence made himself unavailable to provide any information regarding exactly what transpired that evening. The only evidence available, (beyond the physical facts), were statements he made to police personnel immediately after the event.[4] Thus, although on autopsy it was shown that Gerald had around the time of his death had alcohol on board, there is no way of knowing how, if at all, such alcohol may have come into play with respect

[4] As is well documented in this Court's files regarding the"related case" in that related case Clarence Munce refused to participate in a court-ordered deposition asserting his Fifth Amendment privilege against self-incrimination literally with respect to every question asked, no matter how unincriminating the response might be. Such intransigence on the part of Clarence, as well as other discovery shenanigans, ultimately resulted in entry of a Sanction Order Of Default, which ultimately led to entry of a significant default judgment against him.

to the events leading up to his death. Nevertheless, Mr. Cline, amongst the litany of affirmative defenses set forth in his Answer, asserted an alcohol-related defense asserting as a "fourth affirmative defense" that: "More than fifty percent (50%) of the approximate cause [sic] of Gerald Munce's death was his own voluntary intoxication. He is barred from any recovery as is his estate."[5] Plaintiffs made three efforts to have any alcohol-based defense predicated on RCW 5.40.060(2) dismissed as a matter of law because there is no evidence beyond rank speculation as to how such intoxicance could have been a "proximate cause" to Gerald's death, which is an essential element of such a defense.[6] Plaintiffs' efforts to exclude such evidence by way of Motion In Limine was also denied.

Nevertheless, at the close of the Defendant's case in chief, the trial court belatedly acknowledging that there was no competent evidence supporting such a defense, (other than rank speculation), dismissed comparative fault, alcohol, and felony defenses under CR 50 standards, as a matter of law. As a result of the trial court's tardy dismissal of such a defense, prejudicial "explosive" alcohol evidence was wrongfully placed before the jury. The trial court also permitted defense counsel to question

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[5] Additionally, Defendant Cline asserted the affirmative defenses of comparative fault, estoppel, "empty chair," (allocation of fault pursuant to RCW 4.22.070), a felony defense pursuant to RCW 4.2.420, and asserted that the Complaint was brought in bad faith, thus violative of CR 11 and RCW 4.84.185.

[6] See, *Hickly v. Bare*, 135 Wn.App. 676, 687, 145 P.3d 433 (2006).

other Munce family members in a manner which suggested that they themselves had breached a duty to prevent the harm that Gerald suffered, even though unlike Mr. Cline who, due to his actions, assumed legal duties which arguably he breached, such family members had no legal obligation to act.

In the crime scene photos taken of Clarence Munce's home immediately following Gerald's shooting there is a box of Benadryl. Defense counsel in closing went so far as to suggest, (without a scintilla of supporting evidence), that Clarence's actions may have been a by-product of his ingestion of Benadryl, at some point prior to the shooting. Such "suggestion" was unsupported by any facts, and no medical testimony based on the appropriate medical-legal standard.

In marked contrast, the trial court excluded from evidence two prior incidents where Clarence Munce had pulled guns on other individuals without valid justification. The trial court did so on the grounds that such events were remote in time, even though Mr. Cline, who is being accused of "negligent entrustment," had been made aware of these events in relatively close proximity to his return of the firearms to Clarence. Thus, his notice was not "remote," and such information went directly to the heart of the question of whether or not he knew or should have known that Clarence, because of "incompetence" and/or

"heedlessness" and/or "recklessness," could not safely have his firearms returned.

These events and issues form the core reason why the Plaintiffs are seeking relief by this Appellate Court.

II. ASSIGNMENT OF ERROR

1. The trial court erred by dismissing as a matter of law Plaintiffs' claim that Defendant Cline was negligent in the performance of a gratuitous undertaking when such a claim was supported by "substantial evidence," and no Court Rule authorized such a dismissal.

2. The trial court erred by effectively dismissing Plaintiffs' "gratuitous undertaking" negligence claim by refusing to instruct the jury with respect to such claim.

3. The trial court erred in failure to give Plaintiffs' proposed Instruction No. 13A, relating to their claim that Defendant Cline was negligent in the performance of a gratuitous undertaking. (Appendix No. 1, p. 4).

4. The trial court erred in giving the Court's Instruction No. 11.5, which instructed the jury that, "[W]hen foreseeability of some harm stems from past actions or conduct, then it must be conduct so repetitive as to make its recurrence foreseeable." (Appendix No. 2, p. 16).

5. The trial court erred by excluding from evidence two prior instances of gunplay where Clarence Munce pulled guns on family members and friends on "remoteness" grounds, when such evidence was relevant to Defendant Cline's knowledge, state of mind, and/or notice of Clarence's potential dangerous tendencies, and the date on which he received such notice was relatively contemporaneous with the events at issue in the case.

6. The trial court erred in failing to dismiss pre-trial as a matter of law defendant's alcohol defense when there was no admissible evidence creating a genuine issue of material fact as to any intoxicance by Gerald Munce was in any way a proximate cause of the events surrounding his death.

7. The trial court abused its discretion and it committed prejudicial evidentiary error by permitting the introduction of testimony regarding alcohol usage, when there was no evidence establishing that such intoxication had anything to do with the underlying events, or was the proximate cause of any injury or damages suffered by either the Plaintiffs or Plaintiffs' Decedent.

8. The trial court erred by permitting defense counsel to question other Munce family members in a manner suggesting that they had a duty to "do something" when it was never pled that they were

potential "empty chairs", nor was there any facts establishing that they owed any duty which could be subject to breach.

9. The trial court erred by prejudicially allowing defense counsel to question Plaintiffs' witness Ron Boldosser in the confusing and misleading manner, which suggested that he had a previous felony conviction, when in fact he had only a misdemeanor conviction, none of which are crimes of dishonesty within the meaning of ER 609.

10. The trial court erred by prejudicially permitting defense counsel to ask questions and/or to make arguments suggestive that "Benadryl" may have been a contributing factor to the underlying events, when there was no evidence that Clarence Munce, prior to shooting Gerald, had taken Benadryl and, no evidence that the box of Benadryl found within Clarence Munce's home was even owned by him, and no medical testimony in any way linking the taking of Benadryl by Clarence Munce's, (if it ever occurred), behavior on the night in question.

11. The trial court erred by failing to grant Plaintiffs' Motion for a New Trial based on failure of "substantial justice" due to cumulative error including, but not limited to, the inappropriate dismissal of Plaintiffs' gratuitous undertaking claim, instructional error, the trial court's failure to dismiss factually unsupported affirmative defenses, including a defense based on alcohol, felony defense, and comparative fault, when the failure

to dismiss such defenses resulted in the submission of highly prejudicial and explosive evidence in front of the jury, when such defenses ultimately were dismissed at the close of the Defendant's case in chief, misconduct of counsel, and other evidentiary errors which are discussed below.

III. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the trial court err by effectively dismissing, as a matter of law, Plaintiffs' claim that Defendant Cline was negligent in the performance of a gratuitous undertaking, when such claim was supported by substantial evidence?

2. Did the trial court commit reversible error by refusing to instruct, dismissing, as a matter of law, Plaintiffs' gratuitous undertaking claim, when such a claim was supported by substantial evidence?

3. Did the trial court have the authority under CR 50 to dismiss Plaintiffs' gratuitous undertaking claim, when it did so *sua sponte*, and without a motion by the defense?

4. Did the trial court commit reversible erorr by giving Court's Instruction 11.5, which included within its terms language that served to heighten Plaintiffs' burden of proof with respect to such claim, and which essentially interjected a new element into such a claim that otherwise does not exist, as a matter of law?

5. Did the trial court commit reversible error by excluding from evidence two prior incidences of "gun play" on "remoteness" grounds, when such evidence was relevant to Defendant Cline's knowledge, mental state, and/or notice of Clarence Munce's dangerous propensities, a question which was directly at issue and highly relevant to Plaintiffs' "negligent entrustment" claim?

6. Should the trial court have granted Plaintiffs' Motion for a New Trial, based on cumulative evidentiary error, and/or misconduct of counsel, under the facts and circumstances of this case?

IV. STATEMENT OF FACTS

A. Factual Background of the Case.

It is noted that Clarence Munce is the father of Gerald Munce. Gerald Munce is the father of the Plaintiffs, Kristy Rickey and Kelley Cavar, (his daughters), who in this case were acting as Co-Personal Representatives for his estate. Sunny Rhone is Gerald Munce's maternal half-sister and Clarence Munce's step-daughter.

On June 21, 2008, Gerald Munce was fatally shot by his father Clarence Munce. What actually occurred on that date will never be fully known because the two participants in the event are incapable of providing information as to what transpired. Gerald is dead, and Clarence Munce has been determined to be incompetent, and in a related case willfully refused

to provide any testimony regarding the events of that day. What we do know is that in the twilight hours of that day, Clarence called 911 to report that he had shot his son. During the course of such reporting, Mr. Munce said that Gerald was in the middle of the street "bleeding like a stuck hog," (Ex. 207) indicating he shot Gerald while he was running away like a "striped ape." During the 911 call, Clarence reported that Gerald had tried "kicking in his door," but at the scene there was no physical evidence indicating that the door had any damage to it.

As the investigation progressed, Mr. Munce was taken to the police station where he was interviewed by Detective Ben Benson. During the course of that interview, which occurred after Clarence had time to reflect, he provided the following confession:

> *The interview with Clarence began at approximately 2335 hours. Detective Benson began by reading Clarence's Miranda rights from the advisory rights form. Clarence stated he understood his rights and would speak to us. Clarence began by telling us his son was a thief and had stolen things including guns from him in the past. Clarence said that earlier in the day he ran into Gerald at the bar where he drinks quite often. Clarence stated he confronted Gerald about a hood ornament that he wanted back from him that he claimed Gerald stole. However they left each other on good terms. Later, in the evening, Gerald showed up at Clarence's front door banging on it. The two got into an argument in a short scuffle ensured. Clarence said that he hit Gerald with a putter. Gerald got about ten feet away and threw the hood ornament or statue at him. The statue hit Clarence in the left arm. Clarence then said that Gerald was running "like a striped ape" when he pulled out his*

rifle and shot at Gerald. Clarence claimed that he was only trying to scare him and at was aiming at the blacktop. This is the shot that struck Gerald and killed him. Detective Benson stopped Clarence for a moment and asked if he would allow us to audiotape the interview. Clarence agreed to have the interview recorded. Detective Benson turned on the recorder and read Clarence his Miranda warning again. Clarence this time said he was saying anything until he talked to his attorney. Clarence brought out business card on his attorney and showed it to us. Detective Benson told Clarence that he would no longer ask him any questions. Clarence told us that he would tell us what happened. Detective Benson again advised Clarence that since he asked for an attorney that we would no longer ask [sic] [him] questions. Clarence appears confused and he continued to tell us about what happened. We again stopped Clarence and told him that we would not continue the interview. Clarence was placed under arrest and transported to the Pierce County Jail where he was booked for murder in the first degree.

Nothing further happened at this time. (Ex. 23). Clarence was ultimately charged with homicide in the first degree. Such charges did not proceed once it was found that Clarence was incompetent to stand trial due to his dementia. (Ex 137).

An autopsy was performed on Gerald. The autopsy report indicated that as a result of knocking on the door and being assaulted by Clarence with a golf club, Gerald suffered rib fractures and a lacerated liver. (Ex. 42A). Thus, apparently Clarence initially assaulted Gerald with a golf club and, as a gravely wounded Gerald attempted to flee, Clarence retrieved an M1 carbine rifle and fired a fatal shot in Gerald's direction. The autopsy

report further indicated the bullet entered Gerald's back, travelled through his neck and exited through Gerald's jaw. Gerald bled to death on Clarence's driveway, and likely suffered a very painful death. (Ex. 42A).

As noted above, the Plaintiffs in this action brought a separate wrongful suit against Clarence, which already has had substantial attention from this Court. This case relates to Clarence's possession of the M1 carbine rifle he used to fatally shoot Gerald. (Ex. 126). It was undisputed at the time of trial that in May 2007, while Clarence was in the hospital, Gerald, who held a durable power of attorney with respect to his father, removed a large cache of firearms from Clarence's home out of a variety of safety concerns. It was undisputed at the time of trial that Clarence owned a number of firearms, including a couple of M1 carbine semi-automatic rifles, (a World War II weapon), and a variety of other firearms which often were squirrel-holed about Clarence's home, which was often left unlocked and located in close proximity to a school.[7] Clarence

[7] Such safety concerns included but were not limited to the fact that Clarence previously had engaged in a number of erratic, aggressive and violent behaviors including other instances involving "gun play." There was also a concern that Clarence previously had been diagnosed with Alzheimer's/dementia and, due to prior mini strokes, had extremely shaky hands – an obvious concern when one is handling firearms. (RP Vol. VIII, P. 14-23). Such concerns were not new, and as testified at time of trial by Sunny Rhone, such concerns existed as early as 2003, when she had a conversation with Defendant Cline discussing Clarence's past behaviors and concerns regarding his continuing ownership of firearms. According to Sunny Rhone, Mr. Cline was well aware of a number of Clarence's aberrational behaviors, including the fact in the early 1990s, he had "pulled a gun" on a family friend named Bill Federson at a gathering, apparently believing Mr. Federson had inappropriately looked at Mrs. Munce. There is also another incident

returned home from the hospital on June 4, 2007, and discovered that his guns were missing. In response, he called the Pierce County Sheriff's Office who dispatched a Deputy Sheriff named Vickey Kimbriel to Clarence's home. Mr. Cline, perhaps not coincidentally, drove by Clarence's home at the time and stopped when he observed the presence of Deputy Kimbriel's patrol car.[8] According to Sunny Rhone, the following day June 5, 2007, she had a long telephonic discussion with Mr. Cline where she discussed with him and put him on additional notice regarding Clarence's longstanding history of violent and/or belligerent behaviors. Despite the fact that both Gerald and Sunny had placed Mr. Cline on notice with regard to Clarence's potential dangerous

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in the last 1990s, where Clarence, apparently in a state of confusion, pulled a gun on a Marjorie Baughn, his sister-in-law, who was temporarily residing on Clarence's property. Ms. Baughn, who resides out of state, was available to testify telephonically about this incident, but as discussed below the Trial Court excluded her testimony. (*Id*, P. 23).

[8] Mr. Cline, in the course of trial, admitted that prior to arriving at the scene on June 4, 2007, he already had been informed by Gerald that Gerald had removed the firearms from Clarence's possession for "safekeeping." RP Vol. VII, P. 17; RP Vol. VIII, P. 72). During the course of his conversations with Clarence and Deputy Kimbriel, he never informed them that he had such prior knowledge. During the course of the communications between the deputy Clarence and Mr. Cline, it became apparent to Deputy Kimbriel that the guns had only been removed for "safekeeping," and the matter could be best addressed within the family. (RP Vol. IV, P. 120-142). During the course of the conversation with Deputy Kimbriel, Clarence let it be known that he actually intended to sell the guns in the near future. Deputy Kimbriel, seeing an opportunity for an amicable resolution of an inner family squabble, brokered an agreement with Clarence, Gerald and Mr. Cline, the undisputed terms of which was that Mr. Cline would take possession of the firearm collection, **would not return them to Clarence, and would see to their sale.** In reliance upon Mr. Cline's representation, Gerald turned the firearm collection over to Mr. Cline.

propensities, (and physical and/or mental deterioration), where the taking possession of the firearms by Mr. Cline, or alleges that he was being pestered by Clarence to return the guns, he returned the guns to Clarence, despite his prior promises/representations that he would not do so, and would take steps to ensure their sale.[9]

As was shown during the course of trial, after the return of the firearms to Clarence, Mr. Cline became much more actively involved in Clarence's life. Within a scant few months, Clarence not only wrote Gerald out of the will, but also wrote out his granddaughters (Kristy Rickey and Kelley Cavar). (Ex. 129; 147-149; 157-161). In their stead, Mr. Cline was made his primary heir, and Clarence provided Mr. Cline with a "durable power of attorney." (Ex 161). Mr. Cline actively became involved in taking Clarence to his medical appointments, and engaged in tasks that otherwise, previously had been performed by Gerald as a dutiful son.

With respect to the events of June 4, 2007 such issues were first explored with Mr. Cline during the course of his partially videotaped deposition (it occurred over two days) in the above-referenced related lawsuit. During the course of his deposition in this related case defendant

[9] Mr. Cline conceded that Gerald had superior knowledge with respect to his father's behaviors and propensities in comparison to that possessed by Mr. Cline. (RP Vol. VII, P. 20-21). Mr. Cline, although he lived with Clarence, Gerald and Sunny in his teenage years, was not actively involved in Clarence's life until the mid-2000s.

Cline made a number of admissions. Mr. Cline did not dispute that there had been an agreement that he would retain for sale Clarence's firearm collection and, based on such representations, Gerald had turned the firearm collection over to Mr. Cline. (RP Vol. VIII, P. 64-70; 82-89)(Ex. 128). Also, during the course of his deposition which, along with live testimony presented to the jury as substantive testimony he provided:

> *Q: (Lindenmuth) Why did you, after your discussion with the deputy sheriff where you indicated you were going to make arrangements for the sale of these guns, why didn't you immediately take the guns to a gun shop and have them appraised and get the process going?*
>
> *A. (Dennis Cline) That isn't –*
>
> *(Ms. McGaughey): Objection. Form.*
>
> *A. That isn't the way it came down. I didn't say I would make arrangements. I said I would help Clarence because I had – was going to have possession of the guns. I was going to bring them to Clarence and Clarence and me were going to Eatonville and sell the guns.*
>
> *Q. What is up in Eatonville.*
>
> *A. A gun shop.*
>
> *Q. Okay. What's the name of it?*
>
> *A. I don't know. He's a good friend – Gil. It might be Gil's Gun Shop. I don't know.*
>
> *Q. Okay. Was the idea of just selling them back to the gun shop, or was it actually to put them on sale at the gun shop on a consignment basis or something along those lines?*

A. I don't know how they would work that at the gun shop.

Q. Well why didn't you take the guns actually up to Enumclaw or up to is it Eatonville? I always get those two confused.

A. Because I didn't, they weren't my guns to sell. They were Clarence's guns to sell. I just wanted to help him to sell them.

Q. All right. You're going to be – act as his friend and his agent –

A. Yes.

Q. To sell those guns?

A. Yes.

Q. All right. You wanted to make sure it's done right and he wasn't going to get ripped off on those guns like he did the truck; right?

A. Yeah.

Q. All right. ***So you had taken – you know as a friend, you had gratuitously undertaken this, undertaken this commitment to make sure those guns were properly disposed of at that time isn't that right?***

A. ***Yes.*** (Dep. of Cline, Vol. 2, P. 188, L. 13-90, Line 2.) (RP Vol. VIII, P. 89; RP Vol. XI, P. 108).

Given Mr. Cline's admission during the course of his deposition this lawsuit was filed on March 16, 2010.

B. Relevant Pretrial Proceedings.

In Plaintiffs' Complaint, Plaintiffs generally alleged negligence and breach of duties including "negligent entrustment" and negative

performance of an undertaking, which was relied upon by Gerald Munce. (CP 1-9). On June 28, 2010, Defendant Cline filed an Answer and Affirmative Defenses. (CP 15-19). Within the affirmative defenses, the only entities who are identified for allocation under RCW 4.22.070, were Gerald Munce and Clarence Munce. At no time within Defendant's Answer was Sunny Rhone, or any other individual, identified as someone who could be allocated fault, as required under the terms of CR 12(i). Additionally, early within the history of the case, the Defendant moved to dismiss Plaintiffs' claims pursuant to both CR 12(b)(6) and summary judgment standards. In response, Plaintiffs filed a 29-page Memorandum of Points and Authorities, along with a substantial amount of supporting materials in opposition. Plaintiffs' response, which was filed on September 27, 2010, (CP 100-130), at Page 27 through 30, Plaintiff extensively discussed as an alternative theory of liability, Plaintiffs' claim that Mr. Cline, by making a commitment to take charge of Clarence's firearms for safekeeping, had gratuitously assumed the duty that he could not perform negligently under the principles which were previously recognized by Washington Appellate Courts relating to negligent performance of a gratuitous undertaking summary judgment was denied as to both claims.

On October 8, 2010, Defendant's Motion for Summary Judgment was denied. On February 15, 2012, Plaintiffs moved for partial summary judgment regarding a number of affirmative defenses contained within 2085

affirmative defenses regarding comparative/contributory fault, alcohol defense predicated on RCW 5.40.060, affirmative defenses predicated on "estoppel," and the notion that Plaintiffs' lawsuit was violative of CR 11 and/or the frivolous lawsuit statute RCW 4.84.185. (CP 823-24); (CP 825-858).

Within Plaintiffs' moving papers, it was strongly argued that there is no competent evidence that Gerald in any way caused or contributed to his own injuries and/or death, (in other words breached no duty), by going to his father's home on the date of his death. Similarly, it was argued that as a matter of law the evidence was insufficient to establish Defendant's affirmative defense predicated on Gerald's alcohol usage, which under the terms of RCW 5.40.060 requires not only evidence that the plaintiff was under the influence of alcohol or drugs when injured but also that such intoxication was "a proximate cause of injuries" and the plaintiff is more than 50 percent comparatively at fault. See, *Hickly v. Bare*, 135 Wn.App. 767, 787, 145 P.3d (2007).

On March 1, 2012, Defendant filed a response to this motion. Within Defendant's response, all that the defense could point to was the fact that Gerald was "legally intoxicated" within the statutory definition, but never addressed the key issue of whether or not such intoxication as in any way "a proximate cause" to Gerald's death.[10] (CP 984).

Unfortunately, despite the absence of such evidence, a previously assigned trial judge declined to grant Plaintiffs' Motion for Partial Summary Judgment with respect to comparative fault and/or the statutory alcohol defense. (CP 1317-18).

Therefore, given the absence of any competent evidence on such issues, Plaintiffs sought reconsideration under the terms of CR 59. (CP 1319-20). In Plaintiffs' Memorandum In Support of Reconsideration, which was filed on March 26, 2012, Plaintiffs "honed in" on the issue of proximate cause and lack of any evidence beyond "vague allegations" with regard to Gerald's actions and intoxication, and any role in the facts and circumstances surrounding his death, and "the mere fact that plaintiff was intoxicated standing alone is simply not enough." (CP 1321-1333).

[10] The obvious reason why such issues were not addressed within Defendant's response is the fact that Gerald is dead, and Clarence was not talking, either due to his refusal to participate in discovery and/or the fact that he suffered from moderate to severe Alzheimer's/dementia. In other words, based on the record before the trial court at the time, (and thereafter), the evidence of proximate cause, an essential element of the statutory defense provided by RCW 5.40.060 was noticeably absent, and never would, nor could, be available given the absence of any competent witnesses to the event.

Despite Plaintiffs' forceful argument to the contrary, the previously assigned trial judge nevertheless denied reconsideration. (CP 1420-21).

Naturally, concerned by the potential that highly prejudicial alcohol evidence would be submitted during the course of trial, Plaintiffs sought revision of the previously assigned trial judge's urling regarding Plaintiffs' dispositive motion seeking dismissal of Defendant's alcohol-related affirmative defenses. (CP 1568-1569). That motion, which was brought near the trial date, was denied by the Judge who ultimately presided over the jury trial in this case. Unfortunately, the denial of such motions "opened the door" for the Defendant to try to bring before the jury highly prejudicial alcohol evidence, despite the fact that **at no time did there exist evidence which could warrant the submission of such a defense, given the absence of evidence regarding proximate cause.**

On August 22, 2013, Plaintiffs also filed a Motion In Limine seeking to exclude such evidence. (CP 1749-1768). That motion was denied. (CP 2085). (RP Vol. I, P. 30-43). Unfortunately, as a result of such a denial, evidence regarding such alcohol use was placed before the jury. After the evidentiary damage was done, the trial court directed a verdict on both contributory fault and the intoxication defense at the close of the Defendant's case in chief. (RP Vol. X, P. 507); (RP Vol. XI, P. 16, 43-46).

As the Defendant at no time ever identified any party other than Gerald and Clarence to be allocated fault in this case, Plaintiffs did not file a specific motion in limine to exclude any fault allocations, or evidence otherwise suggesting that any other party not named in the lawsuit caused or contributed to Gerald's death.

The defense also filed Motions In Limine. In ruling on Defendant's Motions In Limine, the Court excluded any reference to the Federson and Baughn incidents, which involved the gun play instigated by Clarence. The trial court's rationale for doing so was the fact that such incidents were "too remote" to the event's time issue in the case. (RP Vol. I, P. 104; 125). The Court made such a ruling despite the fact that Plaintiffs vehemently argued that such incidents were relevant to Mr. Cline's notice and/or knowledge, (as well as his mental state at relevant times), and that the receipt of his notice, which occurred both in 2003, and June 5, 2007, were not remote in time to those relevant events. The trial court rejected such arguments. (RP Vol. VIII, P. 14-24).

Ultimately, the trial court did not alter said rulings, despite the fact that during the course of his testimony, Mr. Cline volunteered that he was aware of the Federson incident, which sparked a specific jury question regarding that event. (RP Vol. VIII, P. 71). Additionally, Plaintiffs, who had Marjorie Baughn available to testify, put on an offer of proof

emphasizing the fact that Sunny Rhone had indicated that the incident had been discussed with Cline in 2003, and 2007. Such offer of proof was rejected and Ms. Baughn was not called. *Id.*

C. Relevant Events Occurring During the Course of Trial.

From the inception of trial, the defense in this case attempted to have this case decided not on the facts but on inflammatory appeals to the passion and prejudice of the jury. During the course of the defense opening, Mr. Wall, counsel for defense, immediately began discussing that after Gerald's death it was discovered that Clarence's Hummer SUV had damage to it.[11] By his statements, Mr. Wall was attempting to elude that Gerald, prior to his death, in some fashion caused damage to the Hummer. Plaintiffs were forced to object to this factually unsupported allegation.

Early on in the presentation of witnesses, Mr. Wall began questioning Sunny Rhone, in a fashion which suggested that she had an obligation to "do something," if there was a continuing concern regarding Clarence's continuing possession of firearms. (RP Vol. IV, P. 75-106). Despite the fact that Plaintiffs vehemently objected to such inquiry as

[11] Part of Gerald's concerns regarding Clarence's mental stability was in part was based on his automobile purchases. Gerald was concerned by the fact that Clarence bought a brand new truck from a dealership, decided he didn't like it, and within a few months turned the vehicle back over to the dealership, taking a large loss. Thereafter, the elderly Clarence bought a very large Hummer SUV, as well as a purple late model Dodge Charger. (RP Vol. VIII, P. 113).

being grossly misleading and confusing to the jury, given the absence of any duty on Sunny Rhone's part to act. The trial court overruled such objections.[12] (RP Vol. V, P. 2-13).

Such efforts to blame other family members continued on in defense counsel's argument, (which was subject to objection), which served to invite the jury to ignore the Court's instruction to the jury that the only individuals who could be allocated fault in this case was Gerald and Clarence Munce. (RP Vol. XIII, P. 36).

Defense counsel engaged in similar actions calculated to have inflame the passions of the jury when cross-examining Plaintiffs' witness Ronald Boldosser. Mr. Boldosser was a former tenant of Clarence Munce's, and was the object of some of Clarence's prior aggressive and irrational behaviors. As a tenant of Clarence's, Mr. Boldosser was subject to a drug arrest which ultimately resulted in a **misdemeanor conviction**. Nevertheless, during cross-examination of Mr. Boldosser, (even though such cross-examination was unsupported by ER 609), the defense nevertheless made inquiry with respect to such drug charges, and left the jury with the misimpression that Mr. Boldosser had pled guilty to a felony

[12] The Court will take notice of the fact that Mr. Cline was not sued simply because he's a family member. While one can always hope that family members will take responsibility and act in a manner beneficial to their elderly relatives, such obligation at most is moral and not legal. Mr. Cline was sued in this matter because he had allegedly breached two very discreet duties imposed upon him based on his actions under the circumstances of this case.

offense. (RP VI, P. 35, 36, 49). Additionally, the defense counsel judiciously brought up the fact that Mr. Boldosser had a pending warrant for his arrest. After this prejudicial information was brought out before the jury, it was determined that Mr. Boldosser's warrant was because he missed a court appearance and he had already made arrangements to have the court warrant quashed. (RP Vol. VII, P. 4-12). Mr. Wall, in order to heighten the prejudicial impact of such unwarranted cross-examination, went so far to suggest that Mr. Boldosser was arrested for **five ounces of cocaine, as opposed to the 5 grams he was apparently actually found within his possession.** (RP Vol. VI, P.35) (RP Vol. VIII, P. 12). The trial court refused to give Plaintiffs' proposed curative instruction. (CP 2165-2166).

Plaintiffs urged that the Court give a strong curative instruction regarding relative information brought out by the defense during Mr. Boldosser's testimony. Such a curative instruction not only addressed the fact that Mr. Boldosser had already addressed his prior warrants, but also informed the jury that he had not been convicted of any felony as a result of his arrest.

As discussed above, despite Mr. Cline's acknowledgement that he was well aware of the gun play incidents involving Bill Federson and Marjorie Baughn, the Court refused to admit such evidence. (RP Vol. VII,

P. 14-24). Taking full advantage of the trial court's refusal to permit such evidence, defense counsel, during the course of his closing arguments, repeatedly argued that Clarence had never pulled a gun on anyone in the past, or otherwise been arrested for any act of violence. (RP Vol. XIII, P. 9-10, 19). The trial court and defense counsel, based on the Federson and Baughn incidents knew that such representations were not true. He also tried to blame Clarence's conduct on a box of Benadryl depicted in one of the crime scene photos, even though there was not a scintilla of evidence supporting such an argument. (*Id.* P. 25).

Singularly, and/or in combination, the impact of such evidentiary errors served to deny Plaintiffs of full and fair trial.

As discussed below, the Court's refusal to instruct on Plaintiffs' gratuitous undertaking claim alone, (which is tantamount to a directed verdict on that claim), in and of itself warrants a grant of a new trial on that claim, given the fact that substantial evidence supported each and every one of this claim's elements. (RP Vol. XI, P. 69; 109; RP Vol. XII, P. 56). Additionally, the trial court also engaged an instructional error by not only refusing to give Plaintiffs' proposed instruction regarding the "gratuitous undertaking" claim, but also by giving Court's instruction No. 11.5 which provided:

A person is liable for negligent entrustment if:

(a) That person knew, or should have known in the exercise of ordinary care, that the person to whom materials were entrusted was reckless, heedless, or incompetent; and

(b) That person could have perceived the subsequent acts of that person who materials were entrusted.

When foreseeability of some harm stems frompast actions or conduct, then it must be conduct so repetitive as to make its recurrence foreseeable. (Emphasis added). (RP Vol. XII, P. 3-11;25; RP Vol. XII, P. 58-59).

As discussed below, the emboldened language constitutes an error of law such language does not properly reflect of the appropriate elements of Plaintiffs' "negligent entrustment" claim.

V. ARGUMENT

A. Standards of Review and Rules Relating to Jury Instructions.

With respect to the trial court's dismissal of Plaintiffs' "gratuitous undertaking" claim it occurred under unusual circumstances. There was no motion to dismiss from the defense, yet the trial court *sua sponte* refused to instruct on this claim (RP Vol. XI, P. 109). It is respectfully submitted that what transpired was tantamount and equivalent to a *sua sponte* granting of a CR 50 motion for judgment as a matter of law. By its terms. CR 50(a)(1) does not appear to authorize a trial court to grant a motion for judgment as a matter of law on its own initiative. Rather the rule's language suggests that such a motion can be only made by an opposing

party, "Such a motion shall specify the judgment sought and the law and facts on which **the moving party is entitled to judgment**." (Emphasis added).

It is respectfully suggested that had the drafters of the rule intended to vest a trial court with the authority to, on its own initiative, grant a CR 50 motion for judgment as a matter of law it would have so stated in the rule. One simply needs to look to the language of CR 54(b) to find an example of where the drafters intended to vest such authority. CR 54(b) provides in part "[T]he findings may be made at the time of entry of judgment or **thereafter on the court's own motion or on motion of any party**." (Emphasis added."

Court Rules are interpreted the same way as statutes and the trial court's interpretation and/or application of a Court Rule is subject to *de novo* review. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). Appellate courts cannot supply omitted language when interpreting a statute even when it knows that the omission was clearly inadvertent, unless the omission renders the statute irrational. *State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), citing to *In re Acron*, 122 Wn. App. 886, 891 95 P.3d 12 72 (2004). Thus, given the absence of the authority of the trial court to *sua sponte* dismiss Plaintiffs' "gratuitous undertaking" claim proved in and of itself as grounds for reversal and

remand for a new trial on the Plaintiffs' improperly dismissed gratuitous undertaking claim.

Assuming, for the sake of discussion, that the trial court is vested with such authority, (despite its absence of its conferral within the terms of the rule), an Appellate Court reviews decisions granting or denying judgment as a matter of law *de novo* and apply the same standards as the trial court. See, *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Judgment as a matter of law is not appropriate if, after reviewing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences, substantial evidence exists to support a verdict for the non-moving party. *Id.* See also, *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). "Substantial evidence" is evidence sufficient to persuade a fair-minded, rational person that the premise is true. *Hawkins v. Diel*, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011).

Similarly, a trial court's decision regarding jury instructions are reviewed *de novo* if, based upon a matter of law, or for an abuse of discretion if based on a matter of fact. See, *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Giving an instruction which contains an erroneous statement of the applicable law is a reversible error when it prejudices a party. *Thompson v. King Feed Nutrition Serv., Inc.*, 152 Wn.2d 447, 453, 105 P.3d 378 (2005). A party is generally entitled to

request an instruction only when substantial evidence supports the instruction. *Delahunty v. Cahoon*, 66 Wn. App. 837, 832 P.2d 1378 (1992). Evidence is substantial if it would convince an unprejudiced thinking mind that appeared to declare premise. *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994).

When the record discloses an error in an instruction given on behalf of a party in whose favor the verdict was returned, the error is perceived as prejudicial and it furnishes the ground for reversal unless it affirmatively appears that it is harmless. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995). A harmless error is an error which is trivial, formal, or merely academic, and would not prejudicially interest, or rights of the party asserting it, and in no way affects the final outcome of the case. *Id.* When an instruction fails to properly set forth a party's burden of proof, or alters it in any way the elements of the claim, such an error is presumptively prejudicial and supplies the ground for reversal. *Id.* A new trial is an appropriate remedy for a prejudicial error in jury instructions. *Furfaro v. City of Seattle*, 144 Wn.2d 362, 382, 27 P.3d 1160 (2001). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004).

A court should give instruction which is supported by evidence, and which correctly states the law, is a reversible error if the refusal results and there is **no instruction covering part of the requested party's theory of the case**. See, *Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1996).

As explored below, it was prejudicial error for the trial court to refuse to instruct **at all** regarding Plaintiffs' gratuitous undertaking claim. Such a claim was supported by substantial evidence and plaintiff was entitled to an instruction covering this portion of Plaintiffs' theory of the case.

Additionally the court's Instruction 11.5 altered the elements of Plaintiffs' negligent entrustment claim, and the Plaintiffs' burden of proof, in such a prejudicial manner that a new trial with respect to this claim is also warranted.

More generally, issues of law review de novo. Thus if a motion for a new trial was to a disputed issue of law the standard review is de novo. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 79-80, 248 P.3d 1067 (2011). If what at issue is whether or not the trial court should have granted a new trial because of misconduct of counsel or evidentiary error an abuse discretion standard is applicable. See *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012); see also, *Salas v.*

Hi-Tech Erectors, 168 Wn.2d 644, 668-69, 230 P.3d 583 (2010). As explored in the *Salas* case a trial court abused its discretion when its decision is "Manifestly unreasonable or based on untenable grounds or reasons." *Id.* The same is true with respect to issues regarding motions in limine and Motion for a New Trial pursuant to CR 59. See generally, *McCoy v. Ken Nursery, Inc.*, 163 Wn.App 774, 260 P.3d 967 (2011); *Fenimore v. Donald Drake Constr., Inc.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1786).

When applying the above-reference standard to review one more error is occurred during the course of the trial warranting the grant of a full or at least partial new trial based on the matters discussed below.

B. The Trial Court Committed a Reversible Error When it *Sua Sponte* Dismissed Plaintiffs' "Gratuitous Undertaking" Claim and/or by Refusing to Instruct on this Claim, which is otherwise by "Substantial Evidence."

As noted above when the trial court fails to provide an instruction on an alternate theory of liability otherwise supported by the evidence, it is prejudicial error, unless it can be shown otherwise to be harmless. See, *Griffin v. West RS Inc.*, 97 Wn.App 557, 984 P.2d (1999), *rev'd*, 143 Wn.2d 81, 18 P.3d 558 (2001). As Professor Tegland observed at 14A WAPRAC § 31:22 (2d Ed. 2013), the parties are entitled to have their

respective theories of the case presented to the jury by way of instructions, including multiple claims and even inconsistent defenses.

Plaintiff proposes Instruction No. 13A is a correct statement of the law and provided:

> *Additionally and/or alternatively, plaintiff's claim that defendant Dennis Cline negligently performed a gratuitous undertaking. A defendant is liable for the negligible performance of gratuitous undertaking when: (1) while otherwise having no duty to do so, the defendant gratuitously agrees or promises to render services, or engage in actions for another, for which the defendant should recognize as necessary for the protection of other persons; (2) the defendant, upon commencement or during performance of such service or act, fails to exercise ordinary care in the performance of the service or such act; and (3) the plaintiff(s) were injured as a proximate cause of the defendant's failure to exercise ordinary care which increased the risk of harm, or because of reliance by the plaintiff so the defendant would perform the undertaking."*

This instruction was based on *Regan v. City of Seattle*, 76 Wn.2d 501, 505, 858 P.2d 12 (1969); *Burg v. Shannon and Wilson, Inc.*, 10 Wn. App. 798, 808-09, 43 P.3d 526 (2012) and Restatement (2nd) of Torts § 323 and 324. As discussed in *Estes v. Lloyd Hammerstad, Inc.*, 8 Wn. App. 22, 26, 503 P.2d 1149 (1972), the doctrine of gratuitous undertaking is based on "tort and agency principles" which are "codified" within Restatement (2nd) of Agency § 379(2); Restatement (2nd) of Agency § 378 and § 401 and Restatement (2nd) of Torts § 323. Additionally, the

language of Restatement (2nd) of Torts § 324 also provided guidance in is otherwise applicable under the facts of this case.

The essential elements of a gratuitous undertaking claim were discussed in *Burg* at Pages 808-809, which provide:

> *As a general rule there is no duty to act on behalf of a stranger. But, if someone gratuitously undertakes to perform a duty they can be held liable for performing it negligently. Some affirmative act or promise that is produced to undertake the duty must be established in order for the doctrine to be applied. See Sheridan, 3 Wn.2d at 423, 100 P.2d 1024 (defendant's insurance company expressly undertook the duty to inspect the hotel elevator and make periodic report to the city on its safety); Brown v. MacPherson's, Inc., 86 Wn.2d 293, 298-300, 545 P.2d 13 (1975) (defendant State of Washington told the avalanche expert that the State would "take care of the matter," and warn property owners of the impending danger, thereby gratuitously undertaking a duty to warn property owners of danger).* (Citation, in part, omitted).

Restatement (2nd) of Torts § 323 (1965) was specifically adopted by our Supreme Court in *Brown v. MacPherson* and also applied in *Estes*. Section 323 provides:

> *One who undertakes, gratuitously or for consideration, to render services to another which it should recognize as necessary to the protection of persons or things, and set it to liability to the other for physical harm resulting from its failure to exercise reasonable care in performance undertaking, if (a) This failure to exercise such care increases the risk of such harm, or (b) The harm is suffered because of the* other's reliance upon the undertaking.

See also, *Meneely v. S.R. Smith, Inc.*, 110 Wn. App. 845, P.3d 49 (2000) (Trade association by promulgating safety standards, even though it had no obligation to do so, was subject to liability pursuant to the "voluntary rescue doctrine" when such standards resulted in the building of an unsafe swimming pool where the plaintiff in an accident broke his neck), similar to § 323, § 324(A) provides:

> *One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary to protect a third person or his things, and set it to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if, (a) His failure to exercise reasonable care increases the risk of such harm, or (b) He undertakes to perform a duty owed by the other to the third person, or (c) The harm is suffered because reliance of the other or the third person upon the undertaking.*[13]

As is self-evident this case involves a unique fact pattern. Nevertheless, all but undisputed facts in this case establish that at a minimum there was a jury question with respect to Plaintiffs' "gratuitous undertaking" claim.

The case of *Crowley v. Spivey*, 825 S.C. 397, 329 S.E.2d 774 (S.C. App. 1985) is extremely instructive with respect to how a Restatement (2nd) of Torts § 323 has application under the similar facts of this case. In

[13] Restatement of 2nd of Torts § 324(A) (1965) was adopted in the *Brown* opinion and utilized in *Meneely*.

Crowley the plaintiff brought an action against the maternal grandparents of his son arising out of shooting of his son by his ex-wife. In *Crowley*, the ex-wife suffered from significant mental illness. Her ex-husband and the children's maternal grandparents were well aware that the ex-wife suffered from paranoid schizophrenia and had been subject to hospitalization due to her mental health condition. Primary custody was given to the children's father, but the ex-wife maintained visitation rights at her home on alternate weekends. (She resided with her parents). Despite her mental illness, the ex-wife was able to purchase a handgun and ammunition.

Upon the ex-husband learning through the children that his mentally ill ex-wife possessed a handgun, he told the maternal grandparents that he would not permit the children to visit the ex-wife so long as she possessed a gun.

The grandparents, apparently distressed by the lack of visitation, promised the ex-husband that they would look for the gun, and told him that the ex-wife had stated that she had previously disposed of it. Based on such an undertaking and assurances, the ex-husband once again permitted visitation. Tragically once visitation resumed, the ex-wife used her gun to murder her own children.

The *Crowley* case went to trial on an injury performance and a gratuitous undertaking theory. The jury returned a verdict in favor of the

ex-husband against the grandparents. The court of appeals affirmed finding that the grandparents had violated duty of care "grounded it in the legal proposition then when one assumes an act, even though under no obligation to do so, may be subject to a duty to act with due care." (Citation omitted). The court further noted once the performance of such a gratuitous undertaking has occurred or begun, "there is no doubt that there is a duty of care."

Applying the elements of such a claim to the facts of this case is simple. Knowing that Gerald had taken possession of the firearms out of safety concerns, Mr. Cline, who otherwise was under no obligation to do so, undertook the duty to secure the firearms away from Clarence for the purposes of having them sold. According to Mr. Cline he "gave his word" to the deputy and Gerald that he would see that the guns were sold and not retuned to Clarence. He admitted that he had "gratuitously undertaken a commitment to make sure those guns were properly disposed of at the time." He clearly breached his commitment to Gerald, (and to the deputy sheriff), by returning the guns to Clarence. Mr. Cline knew that Gerald had removed the guns out of safety concerns, thus it should have been left to the jury to make a determination as to whether or not he knew that he was engaging in services and/or actions which were necessary "for the protection of other persons." It was for the jury to determine whether or

not returning the guns back to Clarence fell below the standard of "ordinary care".[14]

There is simply no question "but for" Mr. Cline's return of the firearms to Clarence was a cause in fact of Gerald's death. One of the returned firearms was used by Clarence to kill his son.

Additionally, and alternatively, it clearly was shown by Mr. Cline's own admission that Gerald relied upon Mr. Cline's representations. If there had been no reliance, it is unlikely that Gerald would have turned the guns over to Mr. Cline when he did.[15]

In this case, the defense never moved for dismissal Plaintiffs' gratuitous undertaking claim because of factual insufficiency. As it is, even if we assume such motion had been made, clearly based on

[14] It was undisputed that he returned the guns prior to informing Gerald that he intended to do so. In other words by the time notice was provided to Gerald that the guns were once again back in Clarence's possession it was "done deal". A reasonable jury could conclude that turning the guns back over to Clarence was "unreasonable," and Mr. Cline prior to doing so, could have utilized other alternatives such as turning the guns over to the sheriff's department (Deputy Kimbriel certainly was a contact person), or providing advance notice to Gerald, so that he could have instituted guardianship proceedings due to concerns regarding Clarence's competency to have guns, or simply following through on his promise and taking the guns to the gun shop for the purposes of sale.

[15] The defense may try to argue that Gerald could have done something after the guns were returned but there was simply no evidence that Gerald would have had a similar opportunity to remove the guns from Clarence's premises in the interim year between the return of the guns and Gerald's death. Additionally, as is self-evident when he did take the guns law enforcement became involved, and shortly thereafter his power of attorney was revoked with Mr. Cline essentially "taking over" the services Gerald had previously provided to his father such as being actively involved in his medical care and the like. There is no indication that beyond taking the guns in June 2007 that there is anything else that Gerald could have done, though his personal notes which were discovered post mortem, tend to indicate that he was contemplating legal action due to concerns regarding his father's competency and past behaviors. (EX 35).

Mr. Cline's own admissions, and the basic facts of this case, there was sufficient evidence to submit the claim to the jury. As such, the trial court erred in dismissing the claim and/or by failing to instruct on a claim that otherwise was supported by "substantial evidence."

Apparently the trial court failed to recognize the breadth of the duty imposed upon one who negligently performs a "gratuitous undertaking." An act even as innocuous as waving another driver on, can be a predicate for liability if the driver who is waved on only gets into a collision with another vehicle. *Alston v. Blythe*, 88 Wn. App. 26, 943 P.2d 692 (1997); *Panitz v. Orenge*, 10 Wn. App. 317, 320, 518 P.2d 726 (1973) (discussing "wave on" liability in a context of negligent performance of a gratuitous undertaking). Indeed, even a doctor who promises to file papers with Labor & Industries, but fails to do so, can be held liable for all the damage flowing from such a failure, under a gratuitous undertaking theory. See, *Roth v. Kay, M.D.*, 35 Wn. App. 1, 664 P.2d 1299 (1983).

It was simply unreasonable for Dennis Cline to return Clarence's firearms to him, particularly having been provided previous notice from those close to Clarence regarding his past aggressive and aberrational behaviors. At a minimum such issues should have been left to the jury.

C. The Trial Court Erred by Providing Court's Instruction No. 11.5.

The court's Instruction 11.5 misstates the law by including the following:

> *When the foreseeability of some harm stems from past actions or conduct, then it must be conduct so repetitive as to make its recurrence foreseeable.*

Washington's negligent entrustment law is based on Restatement (2nd) of Torts § 390 (1965) which provides:

> *One who supplies directly or through a third person a channel for the use of another whom supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise to use it in a manner involving unreasonable risk of physical harm to himself and others and the supplier should expect to share and/or be endangered by its use, is subject to liability for physical harm resulting to them.*

See, *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d at 933 (expressly adopt a Restatement (2nd) of Torts § 390 (1965)). There is nothing in the language of Section 390, nor the *Bernathy* opinion, which in any way suggests that liability can only be imposed if there has been some "past actions or conduct" that must be "so repetitive as to make its recurrence foreseeable." In *Bernethy,* what was at issue was a single instant where a highly intoxicated person was able to acquire a firearm. Further, Plaintiffs' theory of this case was not based on any particular "pattern of conduct" but rather a general and wide variety of prior acts of aggression and/or odd behaviors

indicative that Clarence potentially could be "heedless", "incompetent" and/or "reckless".

The erroneous language in Instruction 11.5 came from the case of *Mejia v. Erwin*, 45 Wn. App. 700, 705-06, 726 P.2d 1032 (1986), a car crash case. In *Mejia*, a parent aided a son in renting a vehicle which was subsequently involved in a serious automobile accident. The trial court and appellate court only disposed of the case by finding that there was no "entrustment" based on simply providing a credit card for the purposes of another to rent a vehicle.

In dicta, the court went on to analyze the question of whether or not there was any factual question on the issue of whether the parent knew or should have known in the exercise of ordinary care that the vehicle was entrusted to someone who was "reckless, heedless, or incompetent." The plaintiff argued the son, some 11 years prior, had gotten a number of tickets when he was a teenager was sufficient to place this matter at issue. The trial court rejected such a proposition primarily based on the fact that such events were too remote in time and distinguishable based on the fact that the driver was no longer a teenager and the absence of intervening tickets were reflected of the maturity that comes with years. The "repetitive language" was *dicta* only, given the Appellate Court held "As a matter of law, Phillip's citation and acts 11 years before the date of the

alleged entrustment were too remote in time to remit the question of Phillip's alleged negligence to go to the jury." Unfortunately, such *dicta* has been repeated over the years. *House v. The Estate of McCamey*, 162 Wn. App. 483, 490, 264 P.3d 253 (2001).

It is respectfully submitted repetition of *dicta* does not create law and *Meija* does not accurately reflect the true elements of the claim of negligent entrustment. Such language had no business being in the Court's instructions to the jury in this case. Indeed, it is noted that the Supreme Court *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911 925-26, 64 P.3d 12 44 (2003) cites to *Mejia*, but **does not include any element of "repetitiveness," when setting forth the elements of a negligent entrustment claim**.

While it is true that foreseeable (knew or should have known) can be established by "repetitive," (habitual?), conduct there is nothing within our case law which in any way suggests that that is a required element.

Otherwise, despite the availability of cogent evidence that based on a variety of dissimilar isolated events that someone may or may not be "competent" to possess firearms or could be characterized as "heedless" and/or "reckless," under the trial court's instruction, despite the strength of such evidence, a plaintiff negligent entrustment claim would be defeated because such conduct was not "repetitive." "Repetitive" also suggests it

must be very similarly. The offensive language, if taken literally, could be construed by a jury to mean that in order for Plaintiffs to prove their claim, that Clarence had had a past history of shooting people, or even shooting his own children in the back, as they were running away. That is confusing nonsense.

Indeed, taking such theory to its logical extreme would absolve an individual who entrusts an automobile to someone who has had their license suspended because of pending vehicular homicide charges (relating to alcohol), who they know to be a raging alcoholic, because the accident which produced the criminal charges was an isolated event and there had been no repetitive history of drunk driving. It is respectfully suggested that notice can just as well be predicated on the **severity of past behaviors just as much as behaviors which are "similar" and/or otherwise "repetitive"**.

The trial court's Instruction No. 11.5 included language which heightened Plaintiffs' burden of proof in this case, precluded plaintiff from arguing their theory of the case, and was an erroneous statement of the law. Such factual arguments should have been left to defense counsel, and should not have been incorporated within the court's instructions.

Further, even if we assume arguendo that "repetitive" conduct is an essential element for "foreseeability" the trial court erred in excluding

Plaintiffs' evidence regarding prior gunplay involving Clarence Munce of which Mr. Cline was made aware.[16] As this is an instructional error relating to Plaintiffs' burden of proof a grant of a new trial on Plaintiffs' negligent entrustment claim is also all but mandatory.

D. The Trial Court Erred By Excluding Evidence Regarding Clarence's Past Gun Play Because It Went Directly To The Issue Of What Mr. Cline "Knew Or Should Have Known," i.e., His Mental State, Knowledge, And What Notice He Had.

It is respectfully suggested that it was unfair for the trial court to require the plaintiffs to prove "repetitive" past misconduct in a case where, on extremely tenuous grounds, it excluded what evidence the plaintiffs did have with respect to past gunplay. Specifically, the trial court excluded the above-referenced Federson and Baughn incidents where, without provocation, Clarence had previously pulled guns on friends and family members. The trial court's justification for excluding such evidence was it was "too remote" as to time. (RP Vol. I, P. 125; R. Vol. VIII, P. 14-24).

Those incidents occurred in the 1980's or 1990's. However, the purpose of presenting such evidence was not necessarily to establish that

[16] Court's Instruction No. 8 relating to superseding/intervening cause was more than adequate to allow the defense to argue their theory of the case i.e. that Mr. Cline could not have anticipated what all the way transpired with one of the firearms that he returned to Clarence. Instruction No. 8 is simply a modified version of WPI 15.5 and correctly and adequately stated the law. Unfortunately Court's Instruction No. 11.5 undermined this instruction by essentially requiring that plaintiff have proof of "repetitive past conduct" which appeared to contradict the language in Court's Instruction No. 8 that "It is not necessary the sequence of events or the particular resultant event be foreseeable".

in fact these events occurred, but rather that Mr. Cline was aware of such facts and based on these facts, (and others), "knew or should have known" that it was dangerous to return the firearm collection to Clarence after the guns had been placed in his control. Further, Mr. Cline's receipt of notice was not "too remote" to the events directly at issue in this case. Sunny Rhone, Gerald's half-sister, testified that in 2003 she had a discussion with Mr. Cline regarding such issues and affirmatively testified that on June 5, 2007, the day after Mr. Cline came in possession of the gun collection, that she also discussed such issues with him. (RP Vol. VII, P. 16).

Whether or not something is temporally remote is only a factor but in and of itself is not controlling on the question of whether or not evidence is admissible and/or relevant. The case of *Lockwood v. AC and S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) presents a prime example of a case where although the evidence was dated, (nearly 50 years old), it nevertheless was relevant and admissible. In that case, the Supreme Court, despite a relevancy objection, found that papers from the 1930s were relevant with respect to knowledge and foreseeability of harm despite their vintage. The court reasoned that evidence is relevant if it tends to make the existence of any fact that is material to the determination of an action more or less probable than it would be without the evidence. ER 401. In rejecting the argument that such documents were "too remote" in time, the

court found that even though plaintiff's claimed exposure to asbestos did not occur until some 20 years after the documents were written they nevertheless were relevant to make a determination as to whether the asbestos hazard involved in that case was foreseeable, some 20 years later when plaintiff became an employee.

Similarly although these instances were temporally remote, nevertheless they were highly relevant to the question of what Mr. Cline knew or should have known with respect to Clarence's dangerous propensities particular, as it relates to firearm usage.

Further, given that Mr. Cline admitted that he had knowledge regarding the Federson incident, such knowledge was not "hearsay" because it was not being submitted for the truth of the matter asserted, but rather for the fact that he was told such information by others which was pertinent and evidence of Mr. Cline's existing mental state at the time he returned the firearms to Clarence, which is one of the critical issues in this case. See, *Subia v. Riveland*, 104 Wn. App. 105, 116 n. 11, 15 P.3d 658 (2001), (information known by an individual and which forms part of the individual's decision-making process is not hearsay because it is not offered to prove the truth of the matter and demonstrates the individual's then-existing mental state). See also, ER 803(a)(3). As indicated above the absence of such evidence was highly prejudicial, particularly given the

erroneous language set forth within Court's Instruction to the Jury 11.5. In assessing the harmfulness of the actions of such evidence (particularly in light of the erroneous instruction) the Court need look no further than how Mr. Wall, Mr. Cline's counsel had used such information.

Despite the fact that Mr. Wall was well aware that such evidence existed, and given the fact that Mr. Cline himself, at least in part, admitted knowledge to the existence of such evidence Mr. Wall nevertheless in his closing argued:

> *We have had a lot of witnesses testify here for the plaintiff. I didn't keep track of the numbers, but they have quite a few.* ***Now not one witness in this case called by any party has ever seen Clarence Munce threaten anybody with a gun, has never seen Clarence Munce violent, has never seen Clarence Munce use a gun in an inappropriate way. We have been here three weeks. Not one witness has testified to that. That's the evidence that we have in this case.*** *We have heard a lot of rumors, innuendo about what Clarence did 20 years ago, what Clarence did here, what he told them. That's not evidence that rumor, innuendo. What did the witnesses say. Not one of them said I ever saw him do that, but I'll be happy to spread the rumor. So we have to look at evidence in a case and who said what and what did they actually see or observe.*

(RP Vol. XIII, P. 9-10; 19).

Mr. Wall repeated the offensive portion of Instruction No. 11.5 verbatim in his closing. (RP Vol. XIII, P. 9-10). Plaintiff had Marjorie Baughn ready, willing and able to testify at time of trial. The trial court, at

defense counsel's urging, precluded her testimony and the defense exploited such an erroneous evidentiary ruling within his closing argument. It is respectfully suggested that such actions are an apparent affront to our truth-finding processes. The Rules of Civil Procedure are tools for "the search for the truth." See generally, *Lowy v. Peace Health*, 174 Wn.2d 769, 778, 280 P.3d 1078 (2012); *State v. Norris*, 157 Wn. App. 50, 79 n. 27, 236 P.3d 255 (2010), *Hyundai Motor America v. Magana*, 141 Wn App. 495, 538, 170 P.3d 1165 (2007), *rev'd* on other grounds, 167 Wn.2d 570, 220 P.3d 191 (2009). When an issue arises based on the admission of prejudicial evidence or improper remark by opposing counsel during closing argument, the ultimate issue is whether or not such actions are prejudicial because they "have the capacity to skew the truth-finding process." See, *Wilson v. Olivetti North American, Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231 (1997). Trials should not be animated by any concept of "the sporting theory of justice." See generally, *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 532 P.2d 822 (1974).

The trial court's evidentiary and instructional errors denied Plaintiffs a full and fair opportunity to present their claims to the jury. The prejudicial impact of such an instruction, particularly given such evidentiary error, should be rather self-evident because it heightened the burden of proof that plaintiff had to prove under circumstances where the

trial court's evidentiary rulings had undercut the Plaintiffs' ability to meet such an erroneously high burden.

E. The Trial Court Erred in Admitting Alcohol Evidence When There Never Was Any Evidence That Alcohol Had Any Role in the Underlying Event or That Gerald Munce Was Comparatively at Fault By Simply Going to His Father's Home at His Father's Request.

As should be self-evident, the trial court's pretrial rulings regarding Cline's RCW 5.40.060 alcohol defense and comparative fault were extremely frustrating, particularly given the fact that at the close of the evidence the court directed a verdict in plaintiff's favor on these issues due to factual insufficiency. As pointed out in the trial court's ruling there is no admissible evidence establishing a causal link between Gerald's alcohol use on the date of his death and the facts leading up to his death. Plaintiff concedes that generally a denial of summary judgment cannot be appealed following a trial, if the denial is based upon a determination that material facts are in dispute which must be resolved by the trier of fact. *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). In contrast when a denial of summary judgment turns on a substantive legal issue an appellate court may review the denial after entry of the final judgment. See, *Bulman v. Safeway, Inc.*, 96 Wn. App. 194, 198, 978 P.2d 568 (1999). Nevertheless, the trial court certainly had the discretion to consider the fact that such earlier erroneous rulings impacted the trial when weighing

whether or not to grant plaintiff's motion for a new trial. See, *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). Also, the trial court's failure to grant Plaintiffs' Motion In Limine on this issue is reviewable under an abuse of discretion standard.

Given the absence of authority to review the underlying erroneous denials of summary judgment, which resulted in the admission of highly inflammatory prejudicial evidence in this case, it is Plaintiffs' position that the Appellate Court should consider what happened in determining if **"substantial justice has been done" and/or whether or not there has been cumulative error**. See, *Storey v. Storey*, 21 Wn. App. 370, 375-77, 185 P.2d 183 (1978) (the cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not"); CR 59 (a)(9).

It has long been recognized in the State of Washington that evidence regarding alcohol, when there is no foundations for its admission), is highly prejudicial in a civil case. *Kramer v. J. I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991) (in *Kramer* the court found that it was error to admit into evidence the Plaintiffs' alcohol usage when there is no evidence that it affected his earning capacity or otherwise had any relevancy to any matter at issue in the case). More recently in *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) the court recognized

that evidence regarding alcohol usage can be "extremely explosive information", and that "the prejudicial effect" of such information "is dramatic". *Id.* 179 Wn. 2d at 374.

Here, due to repetitive pretrial error, "explosive" alcohol evidence was submitted in front of the jury based on the defenses that never had a proper evidentiary basis. That along with other prejudicial events occurring in the course of trial individually or collectively warrant a new trial.

F. Misconduct of Counsel and Evidentiary Error Warrant the Grant of New Trial.

As discussed by Professor Tegland at 15 WAPRAC § 38:10 (2011) the misconduct of counsel is considered to be misconduct of a party even though it is not expressly mentioned within the terms of CR 59 nor specifically within CR 59(a)(2). Professor Tegland in another one of his scholarly works, 14A WAPRAC § 30:33 (2011) discusses in detail when misconduct of counsel can occur how it can unfairly impact an opposing party at time of trial:

> *Counsel had a general duty to keep inadmissible evidence from the jury. Thus, it is improper for counsel to continue to question a witness on matters that have been held by the court to be inadmissible. Likewise, the persistent asking of questions which counsels know are objectionable is misconduct. Prejudice results even though the objections are sustained; the defense [opposing party] should not be*

> *in the unfavorable position of having to make constant objections. Asking questions only remotely related to the issues for the purpose of injecting prejudice may be improper. But if the questions asked on examination are relevant to the issue in the case their asking will rarely found to be misconduct. Counsel generally has a duty to avoid the harassment and embarrassment of witnesses, and the court has a duty to control abuses in this regard. Thus, framed questioned and inflammatory argument in forum is misconduct ...*

Within the same article under the heading of "Injecting Prejudice" Professor Tegland goes on to provide:

> *Perhaps the most common of the unfair attacks employed by counsel at trials is the injection of prejudice into the case. The case should be decided by the jury on the facts proved in court. This the counsel knows, and the injection of prejudice is a deliberate violation of the principles of fair play as they are expressed in the rules and in the standards of justice. It is improper for counsel to make prejudicial statements in the course of trial not supported by the record. And the error cannot be cured by instruction when counsel conveys to the jury the opinion of the court relative to facts in the case expressed in the absence of the jury when the judge was ruling on a point of law. Prejudice takes many forms ...*

In this case defense counsel engaged in prejudicial misconduct during the course of his opening statement when he suggested without a scintilla of any supporting evidence that Gerald vandalized Clarence's Hummer on the night of Gerald's death. Simply because it was subsequently discovered that the Hummer had some damage to it does not

create any form of an inference that somehow Gerald (who no longer can speak for himself) caused such damage. There is no evidence from Clarence in that regard as well.

Additionally, Mr. Wall **had to know that there is no competent or admissible evidence that alcohol in any way came into play with respect to the events leading up to Gerald's death.** As evidenced by the trial court's directed verdict on that affirmative defense such evidence was simply nonexistent or too speculative to support its submission. In closing, he attempted to argue Benadryl could have been a cause of Clarence's actions. Without a scintilla of proof that Clarence owned or even took the medication; nor any expert testimony regarding causation, even if we assume Clarence did.

Additionally, Mr. Wall repeatedly asked confusing and misleading questions particularly of Plaintiffs' witness Sunny Rhone suggesting that she and other family members had a duty to "do something" had there been a continuing concern regarding Clarence's ownership of guns. No such duty existed, and defense counsel's actions were so palpable that on September 16, 2013, Plaintiffs' counsel had to file a formal Supplemental Motion in Limine precluding such further misconduct on the part of defense counsel (the blaming of non-named parties, who otherwise had no duty to act). Such questions were highly irrelevant, misleading, confusing

and inadmissible under the terms of ER 401, ER 402 and ER 403. This is because no other family member, (beyond Mr. Cline), had a duty to ameliorate the consequences of Mr. Cline's negligent acts.

Initially, it is noted that at no time pursuant to CR 12(i) did Mr. Cline ever in his Answer assert allocation of fault to any other individual including Sunny Rhone, Kristy Rickey, Ms. Cavar, or the manufacturer of Benadryl.

Additionally, Sunny Rhone was not a claimant in the action nor was there any contention that Kristy Rickey or Kelley Cavar could be comparatively at fault with respect to any of the factual or legal claims involved in the case. Thus such efforts at misleading and confusing misdirection should be viewed as highly inappropriate, and misconduct.

Finally, it was quite clear that Mr. Wall attempted to intentionally mislead the jury with respect to Mr. Boldosser's criminal background.

ER 609(a) under the heading of "General Rule" provides:

> *For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that a witness has been convicted of a crime shall be admitted if elicited from a witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in the excess of one year under the law which the witness was convicted, and the court determines the probative value of admitting the evidence outweighs the prejudice to the party against whom the*

evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment.

As referenced above during Mr. Boldosser's cross-examination, defense counsel misleadingly suggested that Mr. Boldosser had a felony cocaine arrest while a tenant at Clarence's property. That turned out to be entirely untrue and ultimately his arrest for cocaine resulted in a misdemeanor conviction; a conviction which does not result in imprisonment for a period in excess of one year under Washington law. Thus such information in and of itself did not meet standards of ER 609. Further, run-of-the-mill drug possession charges and convictions do not qualify as crimes of dishonesty for the purpose of admissibility under the terms of ER 609(a)(2). See, *State v. Johnson*, 42 Wn. App. 425, 712 P.2d 301 (1995); see also, *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998).

It was entirely irrelevant that Mr. Boldosser apparently had a warrant at the time of his testimony. As Mr. Boldosser ultimately explained that such a warrant was a byproduct of missing a court appearance and he had already contacted the court in order to have such a warrant quashed. Further, simply having a warrant is not a conviction. Thus it is hard to imagine how even if Mr. Boldosser had not taken

measures to quash the warrant how the existence of such a warrant would have been admissible in this civil case.

Obviously the only reason such information was brought forth in a manner contrary to our Rules of Evidence was an effort on the part of defense counsel to interject highly inflammatory and irrelevant matters into the case. Such effort should be viewed as flagrant misconduct that was incurable.

ER 403 precludes the admission of evidence likely to stimulate an emotional response rather than a rational decision because when such evidence is admitted the danger of unfair prejudice exists. *Salas v. Hi-Tech Erectors*, 168 Wn.2d at 669. Generally because there is "no way to know what value the jury placed upon improperly admitted evidence a new trial is necessary". *Salas*, 168 Wn.2d at 673.

In this case, there was a litany of improperly admitted prejudicial evidence and the improper argument, of counsel which cumulatively denied the Plaintiffs' fair trial. There is no evidence that Gerald prior to his death damaged Clarence's Hummer. Alcohol evidence was submitted in front of the jury that had no business being presented. The defense was permitted to "point fingers" at individuals that had no duty to act and who did nothing wrong.

The trial court dismissed an entirely proper "gratuitous undertaking" claim that was supported by the evidence and submitted an unfairly loaded instruction on Plaintiffs' negligent entrustment claim that included an element that simply does not exist under the law.

Individually and/or cumulatively such errors warrants the grant of a new trial.

Under the terms of CR 59(a)(9) a new trial can be granted when "substantial justice has not been done". As discussed in *Olpinski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968), "The trial court has a duty to see that justice prevails." It is respectfully submitted that same is true with respect to the appellate court.

VI. CONCLUSION

For the reasons stated above this case should be remanded for a new trial. This is particularly true with respect to Plaintiffs' gratuitous undertaking claim which was erroneously dismissed by the trial court, despite the fact that substantial evidence supported each and every element of such claim. Further, the trial court also erred when instructing the jury on Plaintiffs' negligent entrustment claim by including an element, (past repetitive behavior), that was not and is not a proper element of such a claim. Although generally repetitive behavior might be one way of establishing what the alleged entrustor knew or should have known it is

respectfully suggested that such a method of proof is not exclusive and certainly is not an element of the claim.

Additionally, sufficient prejudicial evidentiary error and misconduct of counsel occurred warranting the grant of a new trial particularly when viewed cumulatively. Such cumulative errors combined with absent and/or defective instructions overwhelmingly support reverse and remand for a new trial.

Dated this 2nd day of October, 2014 at Tacoma Washington.

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Of Attorneys for Appellant
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DECLARATION OF SERVICE

I, **HEATHER DELIN,** hereby declare ~~under the penalty of~~ perjury under the laws of the State of Washington that the following is true and correct:

1. That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.

2. I am a paralegal working for the *The Law Offices of Ben F. Barcus & Associates, PLLC.*

3. On the 3rd day of October, 2014, a true and correct copy of the **AMENDED APPELLANTS' OPENING BRIEF** was filed via legal messenger (original and one copy), as indicated to the Court of Appeals, Division II, at:

coa2filings@courts.wa.gov

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

In addition, a true and correct copy was sent via email and U.S. Mail to:

Gregory J. Wall, Esq.
Law Office of Gregory J. Wall, PLLC
1521 SE Piperberry Way, Suite 102
Port Orchard, WA 98366
gregwall@gjwlaw.com
donnaterryll@wllps.com
sandyrivas@wllps.com

DATED this 3rd day of October, 2014.

Heather Delin, Paralegal

APPENDIX 1

The Honorable Jack F. Nevin
Trial Date: September 9, 2013

SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

KRISTY L. RICKEY and KELLEY R. CAVAR, individually, and as Co-Personal Representatives of the Estate of Gerald Lee Munce, Deceased,

Plaintiffs,

v.

DENNIS CLINE and "JANE DOE" CLINE, individually, and the marital community comprised thereof,

Defendants.

No. 10-2-07470-3

PLAINTIFFS' PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS (Cited)

DATED this 24th day of September, 2013.

Paul A. Lindenmuth, WSBA # 15817
Attorney for Plaintiffs

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& Associates, P.L.L.C.
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ORIGINAL

INSTRUCTION NO. 11A

One who negligently delivers or entrusts a dangerous instrumentality, such as a gun, to one who is heedless, reckless and/or incompetent to handle it responsibly is liable for all damages which are proximately caused by such act.

See, *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 624 P.3d 1244 (2003); *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 288 (1982)

INSTRUCTION NO. 12A

In order for plaintiffs to establish their claim against Dennis Cline, that he negligently delivered or entrusted firearms to Clarence Munce, the plaintiffs have the burden of proving the following propositions:

(1) That Dennis Cline delivered or entrusted guns to Clarence Munce;

(2) That Clarence Munce was heedless, reckless or incompetent, due to mental and/or physical infirmities, or other reasons to safely possess and/or handle guns;

(3) That Dennis Cline knew or should have known of Clarence Munce's heedlessness, recklessness and/or incompetence; and

(4) That Clarence Munce's heedlessness, recklessness and/or incompetence created an unreasonable risk of harm and that Gerald Munce's injuries were proximately caused by the negligent delivery or entrustment of guns by Dennis Cline to Clarence Munce.

Hickle v. Whitney Farms, Inc., 148 Wn.2d 911, 926, 64 P.3d 1244 (2003)

INSTRUCTION NO. 13A

Additionally and/or alternatively, Plaintiffs claim that defendant Dennis Cline negligently performed a gratuitous undertaking. A defendant is liable for the negligent performance of a gratuitous undertaking when:

(1) While otherwise having no duty to do so, the defendant gratuitously agrees or promises to render services, or engages in actions for another, which the defendant should recognize as necessary for the protection of other persons;

(2) The defendant, upon commencement or during performance of such services or acts, fails to exercise ordinary care in performance of the services or such acts; and

(3) The plaintiff(s) were injured as a proximate cause of the defendant's failure to exercise ordinary care which increased the risk of harm, or because of reliance by the plaintiff(s) that the defendant would perform the undertaking.

See, *Regan v. City of Seattle*, 76 Wn.2d 501, 505, 458 P.2d 12 (1969); *Burg v. Shannon & Wilson, Inc.*, 110 Wn.App 798, 808-09, 43 P.3d 526 (2002); Restatement (2nd) of Torts, §§ 323 and 324.

INSTRUCTION NO. 15A

It is the duty of the court to instruct you as to the measure of damages on the plaintiffs' claim for personal losses suffered by Gerald Munce. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the Plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate Gerald Munce's estate for such damages as you find were proximately caused by the negligence of the defendant.

You should consider the following items:

(1) Economic damages:

(a) The net accumulations lost to his estate. In determining the net accumulations, you should take into account Gerald Munce's age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account Gerald Munce's earning capacity, including his actual earnings prior to death and the earnings that reasonably would have been expected to be earned by him in the future, including any pension benefits.

Further, you should take into account the amount you find that Gerald Munce reasonably would have consumed as personal expenses or reasonably would have contributed to Kristy Rickey

and Kelley Cavar during his lifetime and deduct this from his expected future earnings to determine the net accumulations;

(2) Noneconomic damages:

(a) The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by him prior to his death.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

WPI 31.01.01

INSTRUCTION NO. 19A

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury and/or damage to the plaintiffs. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendant Dennis Cline and Gerald Munce.

Fault cannot be apportioned in this case to Kristy Rickey, Kelley Cavar or any other non-named entities or individuals.

WPI 41.04

INSTRUCTION NO. 22

Fault cannot be apportioned in this case to Kristy Rickey, Kelley Cavar or any other non-named entities or individuals.

INSTRUCTION NO.23

You are not to consider Gerald Munce's alcohol use on the day of his death, or otherwise, when assessing fault of damages in this case.

APPENDIX 2

10-2-07470-3 41340432 CTINJY 10-07-13

FILED
DEPT. 6
IN OPEN COURT
OCT 04 2013
Pierce County, Clerk
By
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

Kristy L. Rickey, Plaintiff, vs. Dennis Cline, Defendant.	CAUSE NO. 10-2-07470-3

COURT'S INSTRUCTIONS TO THE JURY

DATED THIS 2 day of Oct, 2013.

Jack Nevin
JUDGE JACK NEVIN

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the

witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not

supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific

instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 4

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have medical insurance, liability insurance, workers' compensation, or some other form of compensation available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 5

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 6

A cause of an injury is a proximate cause if it is related to the injury in two ways: (1) the cause produced the injury in a direct sequence unbroken by any new independent cause, and (2) the injury would not have happened in the absence of the cause.

There may be more than one proximate cause of an injury. If you find that the defendant Dennis Cline was negligent and that such negligence was a proximate cause of the plaintiff's injuries, it is not a defense that the negligence of Clarence Munce was also a proximate cause.

However, if you find that the sole proximate cause of injury or damage to the plaintiff was Clarence Munce, then your verdict should be for the defendant.

INSTRUCTION NO. 7

Before a percentage of negligence may be attributed to any entity that is not party to this action, the defendant has the burden of proving each of the following propositions:

First, that the entity was negligent; and

Second, that the entity's negligence was a proximate cause of the damage to the plaintiffs.

INSTRUCTION NO. 8

A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an event.

If you find that the defendant was negligent but that the sole proximate cause of the death of Gerald Munce was a later independent intervening act of a person not a party to this action that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the death of Gerald Munce. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening act, then that act does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the death of Gerald Munce.

It is not necessary that the sequence of events or the particular resultant event be foreseeable. It is only necessary that the resultant event fall within the general field of danger which the defendant should reasonably have anticipated.

INSTRUCTION NO. 9

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 10

An act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of a third person.

INSTRUCTION NO. 11

An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect the conduct of a third person, in such a manner as to create an unreasonable risk of harm to another.

INSTRUCTION NO. 16.5

A person is liable of negligent entrustment if:

(a) that person knew, or should have known in the exercise of ordinary care, that the person to whom materials were entrusted was reckless, heedless, or incompetent; and

(b) that person could have foreseen the subsequent acts of that person to whom materials were entrusted.

When the forseeability of some harm stems from past actions or conduct, then it must be conduct so repetitive as to make its recurrence foreseeable.

INSTRUCTION NO. 12

In order for plaintiffs to establish their claim against Dennis Cline, that he negligently furnished firearms to Clarence Munce, the plaintiffs have the burden of proving the following propositions:

(1) That Dennis Cline furnished guns to Clarence Munce;
(2) That Clarence Munce was heedless, reckless or incompetent, due to mental and/or physical infirmities, or other reasons to safely possess and/or handle guns;
(3) That Dennis Cline know or should have known of Clarence Munce's heedlessness, recklessness and/or incompetence; and
(4) That Clarence Munce's heedlessness, recklessness and/or incompetence created an unreasonable risk of harm and that Gerald Munce's injuries were proximately caused by the negligent furnishing of guns by Dennis Cline to Clarence Munce.

INSTRUCTION NO. 13

Plaintiffs Kristy Rickey and Kelley Cavar, as personal representatives of the estate of Gerald Munce, bring two separate legal claims on behalf of the estate:

(1) In one claim they represent the estate for the personal losses suffered by Gerald Munce; and

(2) In the other claim they represent the estate for the losses suffered by the beneficiaries of the estate, Kristy Rickey and Kelley Cavar.

INSTRUCTION NO. 14

It is the duty of the court to instruct you as to the measure of damages on the plaintiffs' claim for personal losses suffered by Gerald Munce. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the Plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate Gerald Munce's estate for such damages as you find were proximately caused by the negligence of the defendant.

You should consider the following items:

(1) Economic damages:

(a) The net accumulations lost to his estate. In determining the net accumulations, you should take into account Gerald Munce's age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account Gerald Munce's earning capacity, including his actual earnings prior to death and the earnings that reasonably would have been expected to be earned by him in the future, including any pension benefits.

Further, you should take into account the amount you find that Gerald Munce reasonably would have consumed as personal expenses or reasonably would have contributed to Kristy Rickey and Kelley Cavar during his lifetime and deduct this from his expected future earnings to determine the net accumulations;

(2) Noneconomic damages:

(a) The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by him prior to his death.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 15

It is the duty of the court to instruct you as to the measure of damages on plaintiffs' claim for losses suffered by Kristy Rickey and Kelley Cavar. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate Kristy Rickey and Kelley Cavar for such damages as you find were proximately caused by the death of Gerald Munce.

You should consider the following items:

(1) Economic Damages:

(a) You should consider as past economic damages any benefit of value, including money, goods, and services that Kristy Rickey and Kelley Cavar would have received from Gerald Munce up to the present time if Gerald Munce had lived.

(b) You should also consider as future economic damages what benefits of value, including money, goods, and services Gerald Munce would have contributed to Kristey Rickey and Kelley Cavar in the future had Gerald Munce lived.

(2) Noneconomic Damages:

You should also consider what Gerald Munce reasonably would have been expected to contribute to Kristy Rickey and

Kelley Cavar in the way of love, care, companionship, and guidance.

In making your determinations, you should take into account Gerald Munce's age, health, life expectancy, occupation, and habits of industry, responsibility and thrift. You should also take into account Gerald Munce's earning capacity, including Gerald Munce's actual earnings prior to death and the earnings that reasonably would have been expected to be earned by Gerald Munce in the future. In determining the amount that Gerald Munce reasonably would have been expected to contribute in the future to Kristy Rickey and Kelley Cavar, you should take into account the amount you find Gerald Munce customarily contributed to Kristy Rickey and Kelley Cavar.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 16

You should decide the case of each plaintiff separately as if it were a separate lawsuit. The instructions apply to each plaintiff unless a specific instruction states that it applies only to a specific plaintiff.

INSTRUCTION NO. 17

The plaintiffs have the burden of proving each of the following propositions:

First, that the defendant Dennis Cline acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that plaintiff was injured;

Third, that any negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions have not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 18

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiffs. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may only include Dennis Cline and Clarence Munce.

INSTRUCTION NO. 19

According to the mortality tables, the average expectancy of life of Gerald Munce, a male aged 58 years is 22.82 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

According to the mortality tables, the average expectancy of life of Kristy Rickey, a female aged 40 years is 42.24 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

According to the mortality tables, the average expectancy of life of Kelly Cavar, a female aged 38 years is 44.14 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

INSTRUCTION NO. 20

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question

that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.